Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CUCAMONGANS UNITED FOR REASONABLE EXPANSION ("CURE"), a Non-profit Unincorporated Association; THOMAS BRADFORD; MARILYN SUE BRADFORD; LEO ORVANANOS; SHIRLEY ORVANANOS,

Petitioners,

versus

CITY OF RANCHO CUCAMONGA; BRAD BULLER, an Individual, in His Individual and Official Capacity; THOMAS GRAHN, an Individual, in his Individual and Official Capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED.

I. WAS IT ERROR TO ABSTAIN FROM DECIDING THE PETITIONERS' DUE PROCESS CLAIMS UNDER 42 U.S.C. SECTION 1983 FOR A FAIR HEARING WHEN CALIFORNIA'S STATUTORY AND MUNICIPAL LAW UNAMBIGUOUSLY RECOGNIZES THEIR PROPERTY RIGHT TO PARTICIPATE IN A TENTATIVE MAP APPROVAL PROCESS FOR A SUBDIVISION BUT THEN UNAMBIGUOUSLY DENIES THEM ANY OPPORTUNITY TO ASSERT FOR AS LONG AS TEN YEARS AFTER APPROVAL OF THE TENTATIVE MAP EMERGENT PUBLIC HEALTH AND SAFETY CONCERNS BASED UPON NEW KNOWLEDGE AND NEW SCIENCE WHICH CALLS INTO QUESTION THE INTEGRITY OF THE ASSUMPTIONS RELIED UPON BY THE CITY IN 1990 TO CONCLUDE THAT THE SUBDIVISION WAS SAFE?

II. DOES THAT PART OF CALIFORNIA'S SUBDIVISION MAP ACT WHICH DENIES THE PETITIONERS FOR AS LONG AS TEN YEARS AFTER THE CITY'S APPROVAL OF A TENTATIVE SUBDIVISION MAP ANY OPPORTUNITY FOR A HEARING TO ASSERT EMERGENT PUBLIC HEALTH AND SAFETY ISSUES BASED UPON NEW KNOWLEDGE AND NEW SCIENCE CALLING INTO QUESTION THE SAFETY OF THE PROJECT DEPRIVE THEM OF THEIR DUE PROCESS RIGHT TO A HEARING ON THESE ISSUES AT A MEANINGFUL TIME AND IN A MEANINGFUL MANNER?

III. EVEN IF THE DISTRICT COURT'S ABSTENTION WERE APPROPRIATE, WAS CERTIFICATION BY THE COURT OF APPEALS TO THE CALIFORNIA SUPREME COURT OF THE QUESTION OF THE PETITIONERS' RIGHTS IN THE CIRCUMSTANCES THE MOST EXPEDITIOUS AND FAIR METHOD OF RESOLVING THEIR CLAIMS IN TIME TO DO THEM ANY GOOD?

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The opinion of the United States Court of Appeals for the Ninth Circuit in *Cucamongans United for Reasonable Expansion ("CURE") et al. v. City of Rancho Cucamonga et al.*, 2000 US App. Lexis 954 (9th Cir. 1/21/00), is set forth in the Appendix hereto (App. 1a).

The Memorandum of Decision of the District Court for the Central District of California in *Cucamongans United for Reasonable Expansion ("CURE") et al. v. City of Rancho Cucamonga et al.*, is unreported and set forth in the Appendix hereto (App.7a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court of the Central District of California was entered on January 21, 2000 (App. 7a-12a). This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act–42 U.S.C. Section 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Section 66452.6 of California's Subdivision Map Act:

> (a)An approved or conditionally approved tentative map shall expire 24 months after its approval or conditional approval, or after any additional period of time as may be prescribed by local ordinance, not to exceed an additional 12 months. However, if the subdivider is

> required to expend one hundred twenty-five thousand dollars ($125,000) or more to construct, improve, or finance the construction or improvement of public improvements outside the property boundaries of the tentative map...which are reasonably related to the development of that property, each filing of a final map authorized by Section 66456.1 shall extend the expiration of the approved or conditionally approved tentative map by 36 months from the date its expiration, as provided in this section, or the date of the previously filed final map, whichever is later. The extensions shall not extend the tentative map more than ten years from its approval or conditional approval....

Section 65033 of California's Government Code:

> The Legislature recognizes the importance of public participation at every level of the planning process. It is therefore the policy of the state and the intent of the Legislature that each state, regional, and local agency concerned in the planning process involve the public through public hearings, informative meetings, publicity and other means available to them, and that at such hearings and other public forums, the public be afforded the opportunity to respond to clearly defined alternative objectives, policies, and actions.

Section 65090 of California's Government Code:

(a) When a provision of this title requires notice of a public hearing to be given pursuant to this section, notice shall be published pursuant to Section 661 in at least one newspaper of general circulation within the jurisdiction of the local agency which is conducting the proceeding at least 10 days prior to the hearing....
(b) The notice shall include the information specified in Section 65094.
(c)In addition to the notice required by this section, a local agency may give notice of the hearing in any other manner it deems necessary or desirable.

Section 65091 of California's Government Code:

(a) When a provision of this title require notice of a public hearing to be given pursuant to this section, notice shall be given in all of the following ways:

...

(3) Notice of the hearing shall be mailed or delivered at least ten days prior to the hearing to all owners of real property as shown on the latest equalized assessment roll within 300 feet of the real property that is the subject of the hearing....

Section 65103 of California's Government Code:

> Each planning agency shall perform all of the following functions:
>
> ....
>
> (d) Endeavor to promote public interest in, comment on, and understanding of the general plan, and regulations relating to it.

Section 65961 of California's Government Code:

> Notwithstanding any other provision of law, upon approval or conditional approval of a tentative map for a subdivision of single- or multiple-family residential units..., during the five year period following recordation of the final map or parcel map for the subdivision, a city...shall not require as a condition of the issuance of any building permit...for such...residential units, conformance with or performance of any conditions that the city...could have lawfully imposed as a to the previously approved tentative or parcel map....
>
> However, the provisions of this section shall not prohibit a city...from doing any of the following:
>
> (a) Imposing conditions or requirements upon the issuance of a building permit...which could have been lawfully imposed as a condition to the approval of a tentative or parcel map if the local agency finds it necessary to impose the condition or requirement for any of the following reasons:
>
> > (1) A failure to do so would place the residents of the subdivision or of the immediate community, or both, in a condition perilous to their health or safety....

Section 16.16.170 of the Ordinances for the City of Rancho Cucamonga:

Extensions. A. Request by Sub-divider.
The sub-divider or his representative may request an extension of the expiration date of the approved or conditionally approved tentative subdivision map by written application to the community development department. The application shall be filed not less than sixty days before the map is to expire, and shall state the reasons for requesting the extension.
B. City Planner Action. The city planner may extend the approval of a tentative tract map if he finds that there has been no significant changes in the general plan land use element, development code or other applicable specific/community plan, character of the area within which the map is located, or current planning policy or past practice that would cause the approved plan to become inconsistent or nonconforming. If the city planner finds that there is significant change, [he] shall refer the extension request to the planning commission for consideration.
C. Time Limit of Extension. Extensions may be granted for a period or periods not exceeding a total of three years.
D. Conditions of Approval. As a condition of the extension of a tentative tract map, after conducting a public hearing, the city planner or planning commission, may impose new conditions or revise existing conditions on the approved tentative as they find necessary.
All public hearing notice requirements of the State Subdivision Map Act shall apply.

....

G. Findings. The granting of an extension shall require all of the following findings to be made by the approving body:

....

3. The extension of the tentative map is not likely to cause public health or safety problems;

4. The extension is within the time limits prescribed by state law and local ordinance.

Unless all of the above findings are made by the approving body, the requested extension shall be denied.

Appellate Rule 29.5(a) of the California Rules of Court

> (a)The California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, provided that:
>
> (1) the certifying court request the answer;
>
> (2) the questions may be determinative of a cause pending in the certifying court; and
>
> (3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question.

STATEMENT OF THE CASE.

Cucamongans United for Reasonable Expansion ("CURE"), a non-profit unincorporated association, together with the other individually named Petitioners (collectively referred to as ("CURE") are comprised of homeowners who live adjacent to and in the immediate vicinity of a 26-acre parcel of land located at the base of the San Bernandino Mountains in the Respondent City of Rancho Cucamonga (the City").

In November of 1990, with minimal public input, the City approved a co-called negative declaration and a tentative

map authorizing the subdivision of the parcel into forty (40) single-family residential lots. Under the California Environmental Quality Act, a negative declaration is appropriate only if there will be no significant environmental impact resulting from a project. The City's decision permitted, among other things, the removal of a 30-feet-high, 2,000-feet-long levee and a swale system which was certified by the Federal Emergency Management Agency to withstand a 100-year flood event and to protect downslope homes, including those owned by CURE's members, from unusually heavy rainfall, flooding and debris flow.

In order to compensate for the levee's removal and to provide for the safety of those living in the downslope homes, the City conditioned its approval of the tentative map upon the construction of a debris basin to the north of the development. But experts who have later looked at the project declared the debris basin to be undersized based upon **new** standards of the U.S. Army Corps of Engineers. Moreover, the debris basin is built upon an earthquake fault with a **revised** magnitude of 7.0-7.5.

In 1992, 1993, 1995 and 1996, the City approved extensions of the tentative subdivision map, each time failing to provide notice or a hearing for the public in general or for those immediately affected by the project. Some of these extensions by the City were otherwise irregular on their face and did not comport with the City's procedure for tentative map extensions delineated in its Ordinance 16.16.170.

In the Spring of 1997, the current developer (Lauren Development) applied to the City for design review of the forty homes it proposed to build on the approved subdivision. CURE then learned of this project for the first time on or about May 23, 1997. On July 2, 1997, it brought this civil action in the District Court for the Central District of California alleging most of the facts already recited herein and asserting violations of the Civil Rights Act and seeking declaratory and injunctive relief as well as monetary damages against the City and its planning director and associate

planner.

The gist of CURE's civil rights claim was that the City's failure to provide proper notice and a hearing concerning any of its four successive grants of extension to this tentative subdivision map denied its members due process. As CURE alleged, had the City provided the process that was due it under the federal constitution, CURE would have had the opportunity to adduce evidence, newly emergent since the time when the tentative map was first approved in 1990, which called into question the safety and integrity of the flood infrastructure relied upon by the City in 1990 to conclude that the project was then safe. CURE claimed that with notice and a hearing, it would have had a fair opportunity to persuade the City's planner or its planning com-mission that the project's replacement of a 100-year flood levee and swale system with an inadequate debris basin to the north of the development was unsafe, a threat to public health and good reason to deny the extension. There was also new information concerning the magnitude of a major earthquake fault paralleling the project site which rendered the flood infrastructure fundamentally unsafe and a threat to the public living downslope.

CURE thus claimed that if it had been allowed to present this new evidence to the City at the time of the tentative map extensions, the City would have been required under relevant law to deny the extension upon safety and public health grounds or, if CURE's position was not sustained, it would have had the opportunity to seek judicial review of the City's decision. But without knowledge of the extensions, with no notice being given by the City and no hearing being held, CURE faced an already concluded decision-making process with no meaningful opportunity to subject the City's determination to judicial or administrative scrutiny in time to do it any good. Its members thus live within the danger zone of a project founded upon stale and even obsolete assumptions about flood infrastructure and earthquake exposure; and these down-slope residents have

been denied any role in having this new information and new science factored into a reasoned decision by the City whether to extend this tentative subdivision map.

Following the amendment of CURE's complaint, the City moved to dismiss it or, in the alternative, to abstain from hearing CURE's claims for relief. On December 12, 1997, the District Judge dismissed three counts of CURE's amended complaint and abstained from hearing its remaining claim that it had been deprived of its civil rights under 42 U.S.C. Section 1983 when the City repeatedly failed to provide it with notice of or a hearing on the issue of whether the tentative map for this 40-home subdivision should be extended. (App.7a-12a).

Relying upon this Court's decision in *Railroad Comm'n. of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), the District Court reasoned that the land use issues implicated in this case constitute a "sensitive area of social policy" which federal courts should avoid. (App. at 4a). It also determined that a state court pronouncement that CURE, as adjoining landowners to the project, has no protected property interest under state law to notice and an opportunity to be heard concerning tentative map extensions would obviate the need to resolve any constitutional question since CURE "will be unable to assert a violation of due process." (App. at 10a-11a).

Finally, the District Judge thought that while affected landowners are entitled to notice and an opportunity to be heard whenever the **approval** of a tentative subdivision map substantially interferes with their property rights, (*Id.* citing *Horn v. County of Ventura*, 24 Cal. 3d 605, 616; 596 P.2d 1134(1979)), extending an approved tentative subdivision map has no more than a "de minimis effect " impact upon the affected land and cannot invoke the kind of due process protections CURE seeks here. (*Id.*). Citing *El Patio v. Permanent Rent Control Board of Santa Monica*, 110 Cal. App. 915, 928(1980), the lower court concluded that the Subdivision Map Act permits extensions as to time only, an

insufficient factor to create a right in CURE worth protect-in with due process guarantees.(*Id.*).

On appeal from this ruling to the United States Court of Appeals for the Ninth Circuit, CURE argued that the third prong of the criteria set down by this Court in *Pullman* for abstention had not been satisfied because state of the law in California, both statutory and decisional, is unambiguous that adjoining landowners such as CURE have a protected property interest even in the decisionmaking process to extend a tentative subdivision map where the substantial passage of time itself (here seven to eight years) renders stale and even obsolete the fundamental assumptions which led the City to approve the tentative subdivision map in the first place.

That is, the successive decisions by the City from 1992 through 1996 to extend this 1990 tract map despite new emergent evidence that the project as originally conceived is dangerous to those in the immediate vicinity and a threat to both public health and safety is more than a "de minimis effect" on the property of adjoining landowners. It's a direct threat to the health of their families, the safety of their environs and their property values. CURE accordingly argued that as a matter of due process it was entitled to notice and an opportunity to be heard on such extension requests so that it could adduce probative proof that the original assumptions about flood infrastructure and earthquake exposure had been overtaken by new knowledge and new science which were critical to an informed **current** decision about whether to extend the tentative map.

But even if state law concerning adjacent landowners' rights in this extension process was sufficiently unclear to warrant abstention, CURE asked the Court of Appeals to certify the question directly to the California Supreme Court, an option which would provide an expedited review of its rights in the circumstances and avoid a costly and time-consuming journey through the state court system only to receive the same ruling available through certification.

On January 21, 2000, Court of Appeals issued its decision affirming the District Judge in all respects.(App.1a-5a). It first ruled that all three prongs of *Pullman's* criteria had been satisfied and that abstention was appropriate. (App. at 3a-5a). As to the uncertainty of California law concerning the rights of adjacent landowners in the tentative map extension process, the court noted the limited reach of *Horn v. County of Ventura*, 24 Cal. 3d 605, 616; 596 P.2d 1134(1979), a decision recognizing the right to notice and a hearing for affected landowners but only in the map **approval** process. (App. at 4a-5a). Because no decisional law had extended *Horn* beyond its original holding, the court of appeals could not predict "with any confidence" how California's Supreme Court would decide the issue. (*Id.*)

Turning to CURE's request for certification, the court denied the request but gave no definitive reasons for doing so. (App. at 5a).

CURE has duly filed its petition for writ of certiorari within ninety days of the entry of this ruling. *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445-446(1974). *FTC v.Colgate-Palmolive Co.*, 380 U.S. 374, 384(1965). *United States v. Healey*, 376 U.S. 75, 77-78; 80(1964).

REASONS FOR GRANTING THE WRIT.

I. THE DECISION BELOW MISAPPLIES *PULLMAN*'S THIRD CRITERIA FOR ABSTENTION AND WRONGLY INTERPRETS CALIFORNIA LAW WHICH UNAMBIGUOUSLY RECOGNIZES THE RIGHT OF ADJACENT LANDOWNERS TO NOTICE AND A HEARING DURING THE TENTATIVE MAP EXTENSION PROCESS IN ORDER TO ADDUCE EVIDENCE ON THE SAFETY AND PUBLIC HEALTH ISSUES ASSOCIATED WITH THE EXTENSION.

In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716(1996), this Court acknowledged that federal courts have a strict duty to exercise the jurisdiction they were given by Congress. *Id.* As it observed in *Wisconsin v. Constantineau*, 400 U.S. 433, 437-438 (1971), Congress could have routed all federal constitutional questions through the state court systems, saving to this Court the final say when it comes to the review of state court judgments. *Id.* But the first Congress did not do that and instead created a federal system of courts which are empowered to hear *inter alia* claims concerning federal constitutional rights and claims created by federal civil rights legislation. *Id.*

This Court has repeatedly recognized that the federal courts have a "virtually unflagging obligation ...to exercise [this] jurisdiction given them." *Quackenbush,* 517 U.S. at 716. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821(1976). *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415(1964). *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40(1909). *Cohens v. Virginia*, 19 U.S. 264(1821).

It has held, however, that federal courts may decline to exercise their jurisdiction in otherwise "exceptional circumstances," e.g., where denying litigants a federal forum would clearly serve an important countervailing interest as

when abstention is warranted by principles of proper constitutional adjudication, regard for federal-state relations or "wise judicial administration." See *Colorado River*, 424 U.S. at 813 quoting *County of Allegheny v. Frank Mushada Co.*, 360 U.S. 185,189(1959).

In *Railroad Comm'n. of Tex. v. Pullman Co.*, 312 U.S. 496(1941), this Court recognized that a federal district court is vested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to a state court resolution of underlying issues of state law. In *Pullman*, an authoritative resolution of a complex state law question might have ended the litigation and have avoided any federal constitutional claim at all. *Id.* at 501. The Court therefore directed the District Judge to retain the suit pending a determination by the state court of the underlying state law question. See also *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1971).

Importantly, however, the *Pullman* abstention doctrine only applies where "the issue of state law is uncertain." *Wisconsin v. Constantineau*, 400 U.S. at 438 quoting *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). Thus this Court has approved of abstention where unresolved questions of state law are enmeshed with federal constitutional claims and these questions of state law are so uncertain that only a state tribunal can resolve them. *Reetz v. Bozanich*, 397 U.S. 82 (1970). *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639(1959). But if the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, "it is the duty of the federal court to exercise its properly invoked jurisdiction." *Harman v. Forssenius*, 380 U.S. at 534-535 quoting *Baggett v. Bullitt*, 377 U.S. 360, 375-379 (1964). See *Kusper v. Pontikes*, 414 U. S. 51, 54-55(1973); *Lindsey v. Normet*, 405 U.S. 56, 63 n.4 (1972).

The beginning of any analysis of CURE's property

interests which invoke due process protection under the Fourteenth Amendment and 42 U.S.C. Section 1983 depends upon whether those asserted property interests are defined or created by state law or even by city ordinance. *Goss v. Lopez*, 419 U.S. 565, 572-573(1975). *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *Canfield v. Sullivan*, 774 F.2d 1466, 1467(9th Cir. 1985)("Whether [plaintiff] possessed a protectible property interest...is defined by reference to state law, including city ordinances.").In making such an analysis, this Court has held that attention should be paid not only to the "weight" of the interest at stake but also to the nature of the interest affected. *Board of Regents v. Roth*, 408 U. S. at 570-571. As long as property deprivation is not *de minimis*, its gravity is irrelevant to the question of whether account must be taken of the Due Process Clause. *Snaidach Family Finance Corp.*, 395 U.S. 337, 342(1969). *Boddie v. Connecticut*, 401 U.S. 371 378-379 (1971).

With this in mind, California's statutory law as well the City's ordinance addressing tentative map extensions unambiguously and clearly establish that landowners adjacent to pro-posed developments have the protected property right to notice and a hearing in order to assert their viewpoint concerning the safety and public health concerns attendant not only to the initial approval of a tentative map of a proposed subdivision which affects their respective homes but also to any successive extensions of that tentative map where the passage of time has caused public safety and health assumptions supporting the initial approval to become stale or even obsolete, perhaps dangerously so. No other conclusion comports with a common sense reading of California law.

In the first place, Section 65033 of the state's Government Code recognizes the importance of public participation "**at every stage** of the planning process" and declares that California's policy and the Legislature's intent is that the City involve the public through public hearings,

informative meetings, publicity and other means to engage interested parties and provide them with an "opportunity to respond to clearly defined alternative objectives, policies and actions." To further this end, Section 65103 of the Code requires the City to promote public interest in the general plan of development within its borders and Section 65090 prescribes the kind of notice of a public hearing which the City should provide. Importantly, Section 65091 requires that the City give notice to landowners within 300 feet of the proposed development described by the tentative map.

In the second place, the City's own ordinance addressing the extension of tentative maps provides that one of the required findings its city planner or planning commission must make for granting such an extension is that the extension "is not likely to cause public health and safety problems." Moreover, Section 65961 of the state's Government Code gives the City the power to attach conditions to an already approved tentative subdivision map upon its recordation as a final map if a "failure to do so would place the residents of the subdivision **or of the immediate community , or both**, in a condition perilous to their health or safety...."

Just as importantly, the Legislature has enacted Section 66498.1 of the Subdivision Map Act which applies to vesting tentative maps, a process which affords the developer far more protection against intervening changes in ordinances and regulations than ordinary tentative maps. Even here, the City may disapprove an **extension** of such vesting tentative maps if it determines that *inter alia* "a failure to do so would place the residents of the subdivision **or the immediate community, or both**, in a condition dangerous to their health or safety, or both...."

All this statutory law together with the City's own ordinance addressing the granting of extensions of tentative maps recognize that the vital issues of public safety and health for the immediate community continue to be viable property interests even after initial approval of a tentative

subdivision map. It does not take a quantum leap of logic to imply from this impressive legislative and municipal concern for the continuing health and safety of the community while these stale tentative maps, be they vesting or ordinary, are granted extensions that the very persons living within the areas affected by the project are best equipped and most interested in furthering these values during the extension period by open debate in a hearing of some kind.

But due process is only satisfied when those faced with the threatened loss of property associated the extension of a tentative map are given a meaningful opportunity to voice their legitimate concerns about safety and health issues in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319, 333(1976). After all, this Court has emphasized that due process is "flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334. See *Reynolds v. Cochran*, 365 U.S. 525, 530-531(1961). Notice and a hearing incident to the initial approval of a tentative map cannot satisfy these due process requirements when the passage of time, here seven to eight years, has rendered the information prompting that initial approval possibly irrelevant and perhaps made the project dangerous to those living near it.

In these circumstances, CURE's continuing property interest in maintaining the safety and health of its neighbors and its neighborhood throughout any tentative map extension process, as reflected in California's statutes and the City's municipal ordinance, requires that they be given notice and a hearing concerning any tentative map extension process so that it will have a meaningful opportunity to address the health and safety issues associated therewith.

Because it is crystal clear that the California courts would not come to any different conclusion about CURE's protected property interests at stake here which might avoid in whole or in part the recognition of the federal constitutional rights put in issue by its pleadings or materially change the nature of the problem it has raised on this record,

abstention under *Pullman's* rationale was not warranted . *Harman, supra. Harrison v. NAACP*, 360 U.S.. 167, 177(1959). See *New Motor Vehicle Board of California v. Orrin W, Fox Co.*, 439 U.S. 96, 100(1978).

In addition, it is just as clear that Section 66452.6 of the Subdivision Map Act provides that extensions of the tentative map shall not exceed ten (10) years from its approval or conditional approval. Moreover, like the statutory provisions in *Wisconsin v. Constantineau, supra*, where abstention was not warranted, this statute contains no requirement whatsoever for notice or hearing at any point along this potentially ten-year period when a tentative map can be extended so that adjacent landowners can renew, update or supplement safety or health issues associated with the project which may have emerged through new knowledge or new science since the time the tentative map was first approved. Indeed, a California appellate court has held in *El Patio v. Permanent Rent Control board of Santa Monica,* 110 Cal. App. 3d 915, 928 (1980), that the tentative map extension process described in Section 66452.6 permits only extensions of time, not further input on safety or health issues by adjacent landowners.

Thus California law is unmistakably clear that Section 66452.6 of the Subdivision Map Act on its face requires neither notice nor a hearing for adjoining landowners while the extension process, lasting as long as ten years, endures. As applied to CURE's allegations, this statute has deprived them of due process while the tentative map was repeatedly extended on a project first approved in 1990. There is no uncertainty about the reach of Section 66452.6 and there are no provisions contained therein which could fairly be taken to mean that notice and hearing might be provided under some circumstances but not others. *Wisconsin v. Constantineau, supra.*

"Hence the naked question, uncomplicated by unresolved state law, is whether [this portion of the Subdivision Map Act] on its face [or as applied] is unconstitutional" for

depriving CURE of procedural due process. *Id.* at 438.

As this Court observed in *Zwickler v. Koota,* 389 U.S. 241, 251(1967), abstention should not be ordered merely to await an attempt to vindicate a claim founded upon federal rights in state court. Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional question. *Id.* at 250-251. "We would negate the history of the enlargement of the jurisdiction of the federal district courts if we held the federal court should stay its hand and not decide the question before the state court decided it."*Wisconsin v. Constantineau, supra.*

Because the statutory law of California and the City's municipal law have unmistakably recognized a protected property interest in adjacent landowners to assert their safety and health concerns attendant to the tentative map extension process at a meaningful time and in a meaningful manner and since Section 66452.6 of the Subdivision Map Act does not provide that due process at any point along a ten-year extension process or, in this case, at any point over a span of seven to eight years when the factual basis which led to the approval of the development in the first place has become not only stale but obsolete, abstention from deciding CURE's federal claim was wrong and should be reversed by this Court. The matter should be remanded to the District Court for a trial on the merits of CURE's amended complaint which *inter alia* raises the question of the constitutionality of Section 66452.6 on its face and as applied to the facts here.

II. THE COURT OF APPEALS DECISION REFUSING TO CERTIFY THE QUESTION OF CURE'S PROTECTED PROPERTY RIGHTS IN THE CIRCUMSTANCES OF THIS CASE IS NOT SUPPORTED BY THE DECISIONAL LAW OF THIS COURT.

Without explanation, the court of appeals refused to certify to the California Supreme Court the question of CURE's protected interest in participating in the tentative map extension process. At the very least, the delay engendered by abstention should have prompted the court of appeals to certify the question.

This Court has consistently expressed a preference for certification over abstention in order to ameliorate the delay and expense to which abstention under *Pullman* inevitably gives rise. *Bellotti v. Baird*, 428 U.S. 132, 150-151(1976). *Lehman Brothers v. Schein*, 416 U.S. 386, 390-391(1974). It also provides the litigants with the assurance of gaining an authoritative ruling on a possibly dispositive state law issue. *Id.*

By refusing to certify the question of CURE's right to go forward under state law, the court of appeals has relegated CURE to an expensive and time-consuming journey through the state court system to seek the same answer from the California Supreme Court which it could have obtained by certification; and it loses valuable time in attempting to challenge a project which is founded upon stale if not obsolete assumptions about flood infrastructure and earthquake exposure. This result is at odds with the decisions of this Court and works against a fair and expeditious resolution of this litigation solely to the detriment of CURE.

Accordingly, at the very least, this Court should reverse the court of appeals' decision refusing to certify and order that the question of CURE's protected property rights in the circum-stances of this case be certified to the California Supreme Court for determination.

CONCLUSION.

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate and reverse the abstention order below and remand the matter to the District Court for trial; or, in the alternative, to order certification to the California Supreme Court of the question of CURE's protected property rights in the circumstances of this case.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 98-55262

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CUCAMONGANS UNITED FOR REASONABLE EXPANSION ("CURE"), a Non-profit Unincorporated Association; THOMAS BRADFORD; MARILYN SUE BRADFORD; LEO ORVANANOS; SHIRLEY ORVANANOS,
Plaintiffs-Appellants,

v.

CITY OF RANCHO CUCAMONGA; BRAD BULLER, an Individual, in His Individual and Official Capacity; THOMAS GRAHN, an Individual, in his Individual and Official Capacity,
Defendants-Appellees.

January 4, 2000, Argued and Submitted, Pasadena, California

January 21, 2000, Filed

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JUDGES:
Before: TROTT, W. FLETCHER, Circuit Judges, and MOLLOY, District Judge. n2

n2 The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

OPINION:

MEMORANDUM[1]

Cucamongans United for Reasonable Expansion ("CURE"), Thomas and Marilyn Sue Bradford (the "Bradfords"), and Shirley and Leo Orvananos (the "Orvananoses") (collectively "CURE et al.") appeal an order of the district court granting the City of Rancho Cucamonga's

("City") motion to abstain pursuant to *Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941),* which allows a federal court to abstain in certain cases where state law is doubtful. CURE et al. argue that we should reverse the district court's decision to abstain because the pertinent state law issue was not doubtful. Alternatively, CURE et al. request that we certify the question of state law to the California Supreme Court. We have jurisdiction pursuant to *28 U.S.C. § 1291,* and we AFFIRM the district court and DENY the request for certification.

Because the parties are familiar with the facts of this case, they will not be recited here.

DISCUSSION

A. Pullman Abstention

We review a district court's decision to abstain under Pullman for an abuse of discretion. *C-Y Dev. Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1983).* We must determine whether the district court exercised its discretion "within the narrow and specific limits prescribed by the particular abstention doctrine involved. " Id. (citing *Pue v. Sillas, 632 F.2d 74, 78 (9th Cir. 1980)).*

CURE et al. argue that the district court abused its discretion in abstaining because the requirements for Pullman abstention were not satisfied. In Pullman, the Supreme Court held that a federal court should abstain from deciding a case when state law is uncertain, and a state court's clarification of state law might make a federal court's constitutional ruling unnecessary. *Pullman, 312 U.S. at 501-02.* Thus, Pullman abstention is appropriate when:

> (1) The complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open;

(2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and

(3) The possibly determinative issue of state law is doubtful.

Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996). In this case, the district court held that all three prongs of the Pullman test were satisfied.

After reviewing the record, we hold that all three prongs of the Pullman test, as construed by this Circuit, were satisfied and, therefore, the district court properly abstained. The first prong of the Pullman test was satisfied because this case involves land use planning and "land use planning is a sensitive area of social policy that meets the first requirement for Pullman abstention." See *San Remo Hotel v. City & County of San Francisco, 145 F.3d 1095, 1105 (9th Cir. 1998); Sinclair, 96 F.3d at 409.* The second prong of the Pullman test was satisfied because if a state court determines that CURE et al. have no protected property interest entitling them to notice and an opportunity to be heard, CURE et al. cannot assert a due process claim, thus eliminating the constitutional question presented here. See *Sinclair, 96 F.3d at 409.*

Finally, the third prong of the Pullman test was satisfied because the answer to the question whether CURE et al. have a protected property interest under state law is not clear. See *Sinclair, 96 F.3d at 409.* In *Horn v. County of Ventura, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979),* the California Supreme Court held that "whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable

notice and an opportunity to be heard before the approval occurs." *Id. at 616.* However, the California courts have not extended the decision in Horn beyond tentative map approval to tentative map extension, which is the issue in this case. As such, we cannot "predict with any confidence how the state's highest court would decide" this issue. See *Pearl Inv. Co. v. City & County of San Francisco, 774 F.2d 1460, 1465 (9th Cir. 1985).*

Accordingly, we hold that because all three prongs of the Pullman test were satisfied, the district court properly exercised its discretion in abstaining in this case. We therefore AFFIRM the district court.

B. Certification

Alternatively, CURE et al. argue that this court should certify the question of state law to the California Supreme Court pursuant to California Rules of Court 29.5[3] ("Rule 29.5"). CURE et al. contend that certification is appropriate in this case because it is preferable to Pullman abstention as it "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." See *Bellotti v. Baird, 428 U.S. 132, 150-51, 49 L. Ed. 2d 844, 96 S. Ct. 2857 (1976).*

The decision whether to certify a question of state law to a state supreme court rests in the sound discretion of the federal court. See *Lehman Bros. v. Schein, 416 U.S. 386, 391, 40 L. Ed. 2d 215, 94 S. Ct. 1741 (1974).* After reviewing the briefs, record, and relevant law in this case, we conclude that certification to the California Supreme Court is not appropriate. Accordingly, we DENY CURE et al.'s request to certify the question of state law pursuant to Rule 29.5.

AFFIRMED.

n1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

n3 Rule 29.5 provides that the California Supreme Court may answer a certified question if three requirements are met: (1) the certifying court requests the answer; (2) the question may be determinative of a cause pending in the certifying court; and (3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question.

No.98 55262

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CUCAMONGANS UNITED FOR REASONABLE EXPANSION ("CURE"), a Non-profit Unincorporated Association; THOMAS BRADFORD; MARILYN SUE BRADFORD; LEO ORVANANOS; SHIRLEY ORVANANOS,
Plaintiffs,

v.

CITY OF RANCHO CUCAMONGA; BRAD BULLER, an Individual, in His Individual and Official Capacity; THOMAS GRAHN, an Individual, in his Individual and Official Capacity,
Defendants.

December 12, 1997, Filed

This matter comes before the court on defendant's motion to dismiss and/or abstain. The court has fully considered the briefs, supporting papers, oral argument, and supplemental briefing pertaining to this matter. we rule as follows: . .

I. Violation of 42 U.S.C. Sec. 1983 .

Under the Pullman doctrine, federal, courts should abstain in cases where a constitutional question could be avoided or narrowed by a ruling on an uncertain question of state law. Pearl Inv. Co. v. City and Cty. of San Francisco, 774 F.2d 1460, 1463 (9th Cir. 1985). Pullman abstention is justified where: 1) the complaint 'touches a sensitive area of social policy" into which the federal courts ought not enter;

2) constitutional adjudication can be avoided by a decision on the state law issue: arid 3) the potentially determinative state law issue is doubtful. Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996) (citing Pearl, 774 F.2d at 1463)

The elements for abstention are satisfied here. "[L]and use planning is a sensitive area of social policy that meets the first requirement 'for Pullman abstention." Id. (quoting Kollsman v. City of Los Angeles, 737 F.2d 830, 833 (9thCir. 1984)).

The second Pullman requirement is met where the resolution of a state law issue will "obviate, in whole or in part, or alter the nature of the federal constitutional questions " C-Y Development Co v. City of Redlands, 703 F.2d 375, 379 (9th Cir. 1983) (citations omitted) . A section 1983 claim based on a violation of procedural due process must allege a property interest protected by the Fourteenth Amendment's Due Process Clause. See Portman v. County of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993). Protected property interests are created and defined by state law. Lap ham v. California Energy Resources Conservation and Dev. Comm'n, 705 F.2d 358, 360 (9th Cir. 1983) (quoting Goss v. Lopez, 419 U.S. 565, 572—73 (1975)) A state Court determination that plaintiffs, as adjoining property owners, have no protected property interest under state law entitling them to notice and an opportunity to be heard regarding the tentative tract map extensions,, will eliminate the constitutional question presented here as plaintiffs will be unable to assert a violation of due process. It is immaterial that plaintiff's complaint expressly raises only federal issues where, as here, resolution of the state law question will avoid the constitutional issue. See id.

Finally, it is not clear that plaintiffs have a relevant protectible property interest The California Supreme Court has held that "whenever approval of a tentative' subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval. occurs." Horn' v County of

Ventura, 24 Cal., 3d 605, 616 (1979.) . The court emphasized, however, that constitutional notice and hearing requirements are not triggered "by agency decisions having only a de minimis effect on land." Id.

The parties have not cited, nor has 'the court found, any California case extending Horn beyond the context of tentative map approvals to map extensions like those challenged here[1] We cannot conclude with certainty that a decision extending a pre-existing approved tentative map has more than a mere "de minimis effect" on plaintiffs' property.' Indeed, the Subdivision Map Act has been interpreted to "permit[] an extension only as to 'time '" El Patio v Permanent Rent Control Board of Santa Monica, 110 Cal. App. 3d 915, 928 (1980) .

Based on the foregoing, Pullman abstention is appropriate here. Defendant's motion to abstain is GRANTED.

II. Violation of 42 U.S.C. Sec.1985

Section 1985(3) provides:

> If two or more persons in any State or Territory conspire . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ..: . , the party so injured or deprived may have an action for the recovery of damages,

> occasioned by such injury or deprivation, against any one or more of the conspirators.

In Griffin v. Breckenridge, 403 U.S. 88 (1971), the Supreme Court held that 1985(3) extends beyond state action and reaches purely private conspiracies. See United Brotherhood of Carpenters & Joiners of America, Local 610, AFL—CIO v. Scott, 463 U.S. 825 (1983). In so holding, Griffin emphasized that 1985(3) cannot be applied as a "general federal tort law" because the statute requires a plaintiff to allege "some racial, or perhaps otherwise class—based, invidiously discriminatory animus behind the conspirators' action." Griffin, 403 U.S. at 102.

The court acknowledges a split of authority on the question of whether the class—based, discriminatory animus requirement applies to claims of conspiracy under color of state law like that presented here See e.g., Selzer v Berkowitz, 459 F Supp 347, 351-52 (E D.N Y. 1978) (holding that the Griffin requirement does not apply to governmental conspiracies). Absent controlling precedent from the Ninth Circuit, we think the better view is that adopted by the majority of courts that have directly addressed the issue These courts find that class-based discriminatory animus is required for all claims of conspiracy under § 1985(3), whether private or under color of state law. See, e.g., Gagliardi v. Village of Pawling, 188 F.3d 188 (2d Cir. 1994); Munson v. Friske, 754 F.2d 683 (7th Cir. 1985); Kraft v. Jacka, 669 F. Supp. 333 (D. Nev. 1987) ("The law in this circuit is clearly that class—based animus is an element of a §1985 claim where state action is alleged." (citations omitted)); Stevens v. Rifkin, 608 F. Supp. 710 (N.D. Cal. 1984).

Plaintiffs do not allege that defendants' actions are class— based or motivated discriminatory animus. Thus, they do not state a claim under § 1985.. Defendant's motion to dismiss the § 1985 claim is GRANTED.

III. Violation of the Fourteenth Amendment

Plaintiffs concede that they cannot state a claim directly under the Constitution. See Azul-Pacifico, Inc., v.

City of Los Angeles, 973, F.2d 704, 705 (9th Cir. 1992) . Defendant's motion to dismiss the constitutional claim is GRANTED.

IV. Violation of Cal. Civ.Code 6256

A district court may exercise supplemental jurisdiction over state law claims when the federal and state claims "form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. S 1367(a). Supplemental jurisdiction, is proper where the state and federal claims arise from a "common nucleus of operative facts" such that a plaintiff would ordinarily be expected to try them all in a single judicial proceeding. United Mine Workers v Gibbs, 383 U.S. 715, 725 (1966); Lyon v Whisman, 45 F.3d 758, 760 (3d Cir. 1995)

Plaintiffs' federal claim under section 1983 is based on defendants' failure to 'provide notice and an opportunity to be heard when they extended the tentative tract map in 1992, 1993, 1995, and 1996. The state claim for violation of the California Public Records Act is based on an entirely separate set of actions and events, i.e. defendants' failure to produce public documents requested by plaintiffs since plaintiffs became aware of the development in May, 1997.

Since the two claims do not arise from a "common nucleus of operative facts," we lack jurisdiction over the state law claim. Accordingly, defendants' motion to dismiss this claim is GRANTED.

V. Conclusion

In light of our rulings, only plaintiffs' claim under section 1983 remains. This.matter is STAYED pending resolution in state court of the uncertain determinative state law question noted herein. The clerk is directed to administratively close this case pending resolution of proceedings in the state, courts.

IT IS SO ORDERED

[fn1]Plaintiffs do not challenge the approval of the original tentative map Plaintiff's Opposition, 8:26-28 n 5

(2)

No. 99-1711

Supreme Court, U.S.
FILED
MAY 25 2000
CLERK

In The

Supreme Court of the United States

CUCAMONGANS UNITED FOR REASONABLE EXPANSION ("CURE"), a Non-profit Unincorporated Association; THOMAS BRADFORD; MARILYN SUE BRADFORD; LEO ORVANANOS; SHIRLEY ORVANANOS,

Petitioners,

versus

CITY OF RANCHO CUCAMONGA; BRAD BULLER, an Individual, in His Individual and Official Capacity; THOMAS GRAHN, an Individual, in his Individual and Official Capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

The principal question presented by the Petition is whether the district court properly abstained in this case under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). The district court and Ninth Circuit reasoned that *Pullman* abstention is appropriate because, while California appellate precedent establishes that neighboring landowners have no protectible property interest in the time extension of a pre-existing, approved tentative tract map, the California Supreme Court has not definitively addressed the issue, and therefore the state law issue is doubtful and its resolution in state court could eliminate the need for constitutional adjudication in this case.

The Petition does not point to any conflicting authority, and in fact the Ninth Circuit's decision is consistent with a prior decision of that court on a nearly identical issue. *Lapham v. California Energy Resources Conservation & Dev. Com.*, 705 F.2d 358, 359-60 (9th Cir. 1983). Petitioners are forced to argue that the Ninth Circuit erred because, as they put it, California law is "unambiguous" and "crystal clear" that they enjoy a protectible property interest. To advance this argument, however, they point the Court to inapposite authority, and ignore the complex statutory scheme in California which governs the regulation of subdivisions and which the California state courts routinely are called upon to interpret. It is telling that petitioners also disregard the California appellate authority, noted by the lower courts, which unambiguously holds that they have no protectible property interest in a map extension. The lower courts could have dismissed this case outright, but instead properly abstained on *Pullman* grounds.

The petition also asks the Court to review the Ninth Circuit's decision not to certify the uncertain state law issue to the California Supreme Court. The Ninth Circuit did no more than exercise its sound discretion, as directed by this Court's decision in *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1941). The court properly refused certification because (i) California's certification provision, by its terms, does not apply, (ii) other uncertain state law issues are raised, (iii) petitioners elected to file in federal court rather than pursue their speedy state court remedies, (iv) petitioners failed to name the developer whose entitlement they seek to invalidate, which would not be permitted in state court, (v) the issue lacks adequate factual development, and (vi) the issue is not pending before the state supreme court or sufficiently pressing to require that court's review in the first instance. Review is not warranted.

STATEMENT OF THE CASE

A. Statement of Facts.

This case concerns a 26-acre parcel of land in the City of Rancho Cucamonga, California, located next to two housing tracts at the base of the San Bernardino Mountains.[1]

[1] Importantly, petitioners chose not to name Lauren Development, the current developer of the property, as a party to this lawsuit, although the suit seeks to eradicate Lauren's valuable subdivision entitlement.

In November 1990, after two properly noticed public hearings, the City approved a negative declaration and a tentative tract map, authorizing the subdivision of the property into 40 single-family residential lots. The City's decision permitted, among other things, removal of an aged, breached earthen levee which petitioners' amended complaint alleges currently protects downslope homes.[2] To address this, the City approved the tentative map, subject to conditions which require the developer to, (a) "construct a permanent trapezoidal channel along the north tract boundary," (b) prepare a channel design justified by a final drainage study, approved by the City Engineer, to "[p]rovide a continuous seal between the off-site drainage protection" for this property and the adjacent tract, (c) have "the current FIRM [Flood Insurance Rate Map] Zone A0 designation removed from the project area" and obtain a "Conditional Letter of Map Revision (CLOMR) . . . from the Federal Emergency Management

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[2] Petitioners' Statement of the Case contains a number of factual assertions outside of the amended complaint at issue. At page 8, petitioners state that the levee "was certified by the Federal Emergency Management Agency to withstand a 100-year flood event" and that its removal, "according to several experts," threatens safety and lives. There are no such allegations in the amended complaint. Petitioners fail to state that the levee has 200 foot breach punched through it, that its utility ceased when the U.S. Army Corps of Engineers constructed the Deer Creek Debris Basin and Channel at the base of the San Bernardino Mountains in 1983, that the levee will be replaced by additional drainage protection facilities provided by this development, and that other "experts," including the Corps of Engineers, repeatedly have affirmed that the Debris Basin and Channel provides the necessary protection for these properties.

Agency (both of which have been done), and (d) have "the required drainage channel along the north project boundary . . . be operational prior to removal of the existing levee within the project area."[3] ER 40-41; CR 14.

There was no challenge to the 1990 subdivision approval, although California law permitted judicial review of the project by the filing of a timely petition for writ of administrative mandamus.[4] Cal. Civ. Proc. Code § 1094.5.

In 1992, 1993, 1995, and 1996, the City approved time extensions of the approved tentative map. The amended complaint explains:

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[3] At page 8, petitioners erroneously state that "the City conditioned its approval of the tentative map upon the construction of a debris basin to the north of the development" and that experts later "declared the debris basin to be undersized" based upon new Corps standards. This is not pleaded in the amended complaint and it is factually wrong. There can be no dispute that the Corps constructed the Debris Basin in 1983 and that it was operational for years before the City, in 1990, approved this project, subject to conditions requiring construction of an additional drainage channel along the northern tract boundary to intercept drainage between the Debris Basin and the channel.

[4] Under California case law, the City's subdivision decision became res judicata and its preclusive effect now bars any collateral challenge to that approval. *Mola Development Co. v. City of Seal Beach*, 57 Cal.App.4th 405, 410-13, 67 Cal.Rptr.2d 103 (1997) (failure to timely challenge a tentative map approval bars an action under Section 1983); *Briggs v. City of Rolling Hills*, 40 Cal.App.4th 637, 644-48, 47 Cal.Rptr.2d 29 (1995) (applying the rule to a failure to timely challenge a permit condition).

> Under California's Subdivision Map Act, tentative tract maps ordinarily would expire two years after approval if construction had not commenced. Because of the downturn in California's economy, the state legislature enacted laws to permit extensions of tentative tract maps under certain specific circumstances. The purpose of this legislation was to protect developers who had expended funds to prepare the tentative tract maps but who, at that time, were not financially able to commence construction.

ER 6. Petitioners plead the extensions were unlawful because the City failed to provide affected property owners, including petitioners, notice and an opportunity to be heard. The amended complaint further alleges: "[u]nder state and local law, defendants are required to disapprove a tentative map extension if a proposed development creates safety risks or avoidably impacts habitat." *Id.* Petitioners claim that without notice, they were deprived of the opportunity to present evidence on those state and local law issues.

In Spring 1997, with the subdivision process long since completed, the current developer, Lauren Development, applied to the City for design review of the 40 homes it proposes to build in the approved subdivision. The amended complaint alleges that petitioners first learned of the approved project on about May 23, 1997.

B. Procedural History.

Thereafter, petitioners mounted an aggressive campaign in an effort to block the project.[5] On July 2, 1997, appellant CURE initially filed this action, alleging, inter alia, violations of the Civil Rights Act (42 U.S.C. §§ 1983, 1985) and seeking declaratory and injunctive relief and monetary damages against the City and personally against the City's Planning Director and Associate Planner. On September 11, 1997, the district court granted the City's motion to dismiss, ruling that CURE's allegation

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[5] Petitioner CURE filed a separate action against the City and Lauren Development in state court in *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga*, San Bernardino Superior Court Case No. RCV 30406. That suit contends that in subsequently denying the developer's application for approval of the design of the homes proposed in the subdivision, the City violated the California Environmental Quality Act ("CEQA"; Cal. Pub. Res. Code § 21000 et seq.) by failing to prepare subsequent environmental documentation based upon claimed "new information" and "changed circumstances" – including the very "health and safety" concerns alluded to here. After exhaustively reviewing all of the evidence, the superior court denied CURE's petition for writ of mandate. CURE appealed and the matter is pending in the California Court of Appeal. Cal. Ct. of App., 4 Civil No. E024244. If that were not enough, when the City finally approved the developer's design review application, the two adjoining homeowner associations again sued the City and Lauren Development in state court, reasserting the identical health and safety issues. On May 16, 2000, after reviewing yet additional evidence on the same issues, a different superior court judge again denied the petition for writ of mandate filed. *Haven View Homeowners Assoc. v. City of Rancho Cucamonga*, San Bernardino Superior Court Case No. RCV 38355.

that it is "an unincorporated nonprofit association comprised of 'property owners residing in the Central District of California,' " without more, failed to state facts sufficient to establish standing.

On September 22, 1997, petitioners filed an amended complaint, adding four individual plaintiffs described only as persons who "own property in close proximity to" the property at issue. ER 3; CR 14. The amended complaint realleged the above-noted allegations concerning the tentative map extensions, and again sought damages (including punitive damages) against the City and personally against the planners, and a declaration that the "extensions of the Tentative Map were in violation of federal law and thus of no effect." ER 16-18; CR 14.

On October 2, 1997, the City filed a second motion to dismiss or, in the alternative, to abstain. On December 12, 1997, the district court granted the City's motion. Specifically, the court dismissed petitioners' second (violation of 42 U.S.C. § 1985), third (violation of the Fourteenth Amendment), and fourth claims for relief (violation of Cal. Gov't Code § 6256), and the court granted the City's motion to abstain as to petitioners' Section 1983 claim on *Pullman* abstention grounds. As relevant here, the district court ruled:

> [I]t is not clear that plaintiffs have a relevant protectible property interest . . . [¶] The parties have not cited, nor has the court found, any California case extending Horn [Horn v. County of Ventura, 24 Cal.3d 605, 616, 156 Cal.Rptr. 718 (1979)] beyond the context of tentative map approvals to extensions like those challenged here. We cannot conclude with certainty that a

> decision extending a pre-existing approved tentative map has more than a mere "de minimis effect" on plaintiffs' property. Indeed, the Subdivision Map Act has been interpreted to "permit[ ] an extension only as to 'time' " El Patio v. Permanent Rent Control Board of Santa Monica, 110 Cal.App.3d 915, 928 (1980).

Pet., App. at p. 9a. The Court ordered the matter stayed pending resolution in state court of the uncertain determinative state law question noted. *Id.*

Instead of seizing the opportunity to refile the matter in state court, petitioners appealed on January 9, 1998. On January 21, 2000, in an unpublished memorandum opinion, the Ninth Circuit affirmed. The court of appeals held that the district court did not abuse its discretion in abstaining because all three requirements for *Pullman* abstention have been satisfied in this case. As to the third requirement, the court held that "the answer to the question whether CURE et al. have a protected property interest under state law is not clear . . . [T]he California courts have not extended the decision in *Horn* [*v. County of Ventura*, 24 Cal.3d 605, 156 Cal.Rptr. 718, 596 P.2d 1134 (1979)] beyond tentative map approval to tentative map extension, which is the issue in this case. As such, we cannot 'predict with any confidence how the state's highest court would decide' this issue." Further, after reviewing the briefs, the record and the pertinent law, the court denied petitioners' request to certify the state law question to the California Supreme Court. Pet., App. at pp. 4a-5a.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE COURT OF APPEALS PROPERLY CONCLUDED ABSTENTION ON *PULLMAN* GROUNDS IS APPROPRIATE IN THIS CASE

The primary issue presented in the Petition is whether the court of appeals misapplied the third requirement of *Pullman* abstention. Petitioners do not cite any conflicting authority. Indeed, the Ninth Circuit's decision in this case is fully consistent with a prior decision of that court on a nearly identical issue. *See Lapham v. California Energy Resources Conservation & Dev. Com.*, 705 F.2d 358, 359-60 (9th Cir. 1983) (*Pullman* abstention appropriate where neighboring property owners contended they were entitled to notice and a hearing before state agency approval of a high voltage electromagnetic transmission line).

Instead, petitioners argue that the court of appeals erred in interpreting California law, which they assert "unambiguously" and "clearly" recognizes the right of adjacent landowners to notice and a hearing in connection with approval of a time extension of a pre-existing, approved tentative map. In support, however, petitioners point to authority which is inapposite, and they ignore the complex statutory framework which governs the regulation of subdivisions in California. Importantly, they also bury in the Petition (at p. 18) the fact that a California appellate case, *El Patio v. Permanent Rent Control Board*, 110 Cal.App.3d 915, 928, 168 Cal.Rptr. 276 (1980), has squarely addressed the issue and unambiguously

held that there is no right to notice and a hearing on a map extension.

This Court has long recognized that abstention is proper "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959). Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication. *Harman v. Forssenius*, 380 U.S. 528, 534 (1965).

Under this Court's decision in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 498 (1941), abstention is appropriate where: (1) the complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open"; (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy"; and (3) the possibly determinative issue of state law is doubtful.

The court of appeals held that the third requirement was satisfied in this case because it is not clear whether petitioners have a protected property interest in the extension of a tentative map. Pet. at App. A, p. 4a. While

noting that the California courts have not extended constitutional notice and hearing requirements to map extensions, the Ninth Circuit, like the district court, concluded that it could not "predict with any confidence how the state's highest court would decide" the state law issue. *Id.*

This Court has explained: "Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975). In this case, the California Subdivision Map Act ("Map Act"; Cal. Gov't Code § 66410 et seq.) and the extensive body of California case law which has interpreted it undermine petitioners' claim of a protected property interest. Petitioners misconceive and, unfortunately, ignore the comprehensive statutory framework in California which governs the approval of subdivisions.

A. Under the California Subdivision Map Act and California Case Law, Approval of the Tentative Map is the Critical Stage in the Subdivision Process.

Under the Map Act, adjoining landowners enjoy a protectible property interest at the time the tentative map is approved. This is because the approval of a tentative map invokes "the exercise of judgment, and the careful balancing of conflicting interests, the hallmark of the adjudicative process." *Horn v. County of Ventura*, 24 Cal.3d 605, 615, 156 Cal.Rptr. 718 (1979). The California Supreme Court has explained that:

> *[T]he date when the tentative map comes before the governing body for approval is the crucial date when that body should decide whether to permit the proposed subdivision.* Once the tentative map is approved, the developer often must expend substantial sums to comply with the conditions attached to that approval. These expenditures will result in the construction of improvements consistent with the proposed subdivision, but often inconsistent with alternative uses of the land. *Consequently it is only fair to the developer and to the public interest to require the governing body to render its discretionary decision whether and upon what conditions to approve the proposed subdivision when it acts on the tentative map.*

Youngblood v. Board of Supervisors, 22 Cal.3d 644, 655-56, 150 Cal.Rptr. 242 (1978); italics added.

The Map Act requires that a local agency make certain findings before approving a tentative map. The agency may deny approval, for example, if it finds that the subdivision design or type of improvements is likely to cause "substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat" or cause "serious public health problems." Cal. Gov't Code § 66474. Thus, issues concerning, for instance, the environmental implications of replacing an aged, breached, earthen levee as part of a new subdivision are to be addressed and resolved at the tentative map stage.

After tentative map approval, the approval of the final map becomes "a ministerial act once the appropriate officials certify that it is in substantial compliance with the previously approved tentative map." *Youngblood*, 22

Cal.3d at 656; Cal. Gov't Code § 66474.1. To the extent there is discretion in approving the final map, it is the "discretion only to determine whether there ha[s] been substantial compliance with the conditions."[6] *Soderling v. City of Santa Monica*, 142 Cal.App.3d 501, 509, 191 Cal.Rptr. 140 (1983). This is settled California law. *Great Western Savings & Loan Assn. v. City of Los Angeles*, 31 Cal.App.3d 403, 411, 107 Cal.Rptr. 359 (1973) (once the developer has relied on the approved tentative map with conditions and produced a final map which satisfies the conditions, "he is entitled to acceptance and approval of that final map without the imposition of new or altered conditions").

The Map Act also contains several provisions which address map extensions. One such provision is California Government Code section 66452.6(e). The granting of an extension under this provision is discretionary. *El Patio*, 110 Cal.App.3d at 928. However, the purpose of that extension and the nature of discretion allowed is limited. As even petitioners acknowledge, section 66452.6 does not require notice or a hearing. Further, neither the City nor adjoining landowners are permitted to revisit or reconsider issues, such as the concerns now raised, upon

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[6] Even petitioners conceded below that had the developer here complied with the terms of the tentative map within the initial two years of the tentative map approval, "he would have been entitled to approval of the Final Map without any further public scrutiny." CR 24, p. 6. In other words, petitioners would have had no protectible property interest in final map approval, even if during the same period they had raised exactly the same claims alleged here.

which findings were required at the time of tentative map approval.

El Patio v. Permanent Rent Control Bd. is directly on point. In *El Patio*, the California Court of Appeal held that a City may not lawfully impose additional conditions on the approval of a tentative map extension. The court pointed to Government Code sections 66473 and 66474.1, which provide that, regardless of whether the tentative map is extended, a legislative body shall not deny final map approval "if it finds that the final . . . map is in substantial compliance *with the previously approved tentative map.*" Cal. Gov't Code § 66474.1 (italics added). The Court further explained the limited nature of an extension under Section 66452.6(e):

> [S]ection 66452.6 expressly permits an extension only as to "time." There is no provision which suggests that the legislative body or advisory body is to reconsider its findings under section 66474 when granting an extension of time and indeed, the requirements for notice upon approval of a tentative map (see *Horn v. County of Ventura, supra,* 24 Cal.3d 605) would make such a result unworkable."[7]

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[7] This interpretation is adopted in a leading California treatise on real property and land use: "Whether the period for the map will be extended by the local agency [under section 66452.6(e)] is purely discretionary. It can reject the developer's request for an extension. However, if the extension is granted, the local agency cannot reconsider its findings regarding the map, nor can it impose new conditions on the approval of the tentative map nor new conditions precedent to the approval of the final map." 7 Miller & Starr, *Current Law of Cal. Real Estate* (2d ed. 1990) Subdivisions § 20:125, p. 360.

110 Cal.App.3d at 928. Thereafter, the California Supreme Court denied review in the case. 110 Cal.App.3d at 929.

The other extension provisions in the Map Act reinforce the conclusion that a map extension does not invoke a protectible property interest or due process notice requirements. On two occasions, the California Legislature has enacted mandatory extensions of tentative maps in California Government Code sections 66452.11 and 66452.13, which are automatically approved without more.[8] Petitioners allude to those extensions in their amended complaint as if they apply to *all* the extensions at issue; in the briefs below, they noted that two extensions (the extensions in 1993 and 1996) were granted under these Map Act provisions. ER 6, CR 14. Even assuming petitioners had bona fide health and safety concerns, no further hearing would be required for the grant of these extensions.

California Government Code section 66452.6(b)(1) additionally provides that a "development moratorium" automatically extends the time of a tentative map

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[8] California Government Code section 66452.11(a) provides: "The expiration date of any tentative subdivision map or parcel map for which a tentative map has been approved that has not expired on the date that the act that adds this section becomes effective [September 13, 1993] shall be extended by 24 months." Similarly, California Government Code section 66452.13(a) states: "The expiration date of any tentative or vesting tentative subdivision map or parcel map for which a tentative map or vesting tentative map has been approved, that has not expired on or before the date the act that adds this section becomes effective [May 15, 1996] shall be extended by 12 months."

approval or extension for up to five additional years. Similarly, a tentative map is extended to account for the period of time in which a lawsuit involving the approval or conditional approval of the tentative map is pending. Cal. Gov't Code § 66452.6(c). Still further, a tentative map for a subdivision that is subject to a development agreement may be extended for the period of time provided in the agreement (Cal. Gov't Code § 66452.6(a)) – a period which may be indefinite since the length of its life is a matter for negotiation. Cal. Gov't Code §§ 65864-65869.5. Again, even with these potentially very lengthy extensions of time, adjoining landowners have no protectible property interest at stake, and thus no constitutional due process right to have health and safety concerns aired anew.

In fact, under the Map Act, a timely failure to act on a request for tentative map extension results in a "deemed approval," which divests even the local agency of the right to review the extension. Cal. Gov't Code § 66452.5(c); *Griffis v. County of Mono*, 163 Cal.App.3d 414, 428-30, 209 Cal.Rptr. 519 (1985) (tentative map deemed extended due to failure to timely decide developer's appeal of a decision to rescind previously granted extension).

In short, California's statutory framework for subdivision regulation and the California cases which have interpreted it fully undermine petitioners' argument that California's statutory law clearly establishes that a protected property right in a map extension. There is no dispute in this case that the City granted tentative map approval for the project after providing public notice to affected landowners then of record. Due process was fully satisfied at the time the tentative map was

approved. Four map extensions were then approved before the City, in October 1997, granted its approval of the final map. Again, although not disclosed by the amended complaint, two extensions were legislatively-mandated and automatic under Government Code sections 66452.11 and 66452.13. The other two extensions were granted pursuant to section 66452.6, but, as explained, involved discretion limited to questions of time and no change in the character or intensity of the use previously considered and approved. The extensions did not establish any new substantive rights; they merely extended rights already granted for a longer period of time. *See e.g., Benton v. County of Napa*, 226 Cal.App.3d 1485, 1492, 277 Cal.Rptr. 541 (1991) (making the point as to the extension of a use permit). Petitioners were *not* entitled to reconsideration of the findings concerning safety, habitat or any of the other issues mandated for resolution at the tentative map stage, and the developer was entitled consideration of the time extension without further public notification. *El Patio*, 110 Cal.App.3d at 928.

In view of clear California statutory and case law demonstrating that petitioners have no protected property interest at issue, the lower courts simply could have ordered this action dismissed outright. Instead, the court of appeals noted that the California Supreme Court has not squarely addressed the issue, and consequently it held that the third prong of the *Pullman* test is satisfied in this case because the state law issue is uncertain. The court of appeals' decision was proper in all respects, and does not warrant review by this Court.

B. Petitioners Ignore the Map Act and Applicable California Case Law and Offer Inapposite Statutory Authority.

Petitioners conspicuously ignore the statutory scheme of the Map Act and the cases which have shaped California's subdivision law. Likewise, they acknowledge, but essentially disregard, the state court decision in *El Patio*. Instead, petitioners argue that the court of appeals erred based upon statutory provisions which are irrelevant to the state law question of whether they have a protected property interest in a map extension.

Petitioners erroneously cite Government Code sections 65033 and 65103 as though they stand for the proposition that public participation is required at each stage of the subdivision process. These are statutory provisions contained in the State Planning and Zoning Law (Cal. Gov't Code § 65000 et seq.). They articulate state policy with respect to planning and zoning matters, but have no bearing on subdivisions which, as explained, are separately regulated under the Map Act, California Government Code section 66410 et seq.

Petitioners also miscite California Government Code sections 65961 and 66498.1. The filing of the final map establishes the subdivision, but in order to build upon the land the developer must still comply with any applicable requirements for obtaining building or other permits. Sections 65961 and 66498.1 are directed to the latter types of approvals, not the subdivision itself. Petitioners erroneously state that Section 65961 permits a local agency for public health and safety reasons to impose additional conditions on an already approved tentative map upon

recordation of the final map. The section provides a city with authority to revisit a legitimate safety issue prior to the time it issues "a building permit or equivalent permit."

Petitioners likewise mischaracterize Section 66498.1 which applies to vesting tentative maps.[9] Section 66498.1 is somewhat broader than section 65961, and permits a city to deny or condition a "permit, approval, extension, or entitlement" if it finds that "a failure to do so would place the residents of the subdivision or the immediate community, or both, in a condition dangerous to their health or safety, or both." The provision is inapplicable here, first, because this case involves an ordinary tentative map, not a vesting tentative map. Moreover, contrary to petitioners' assertion, this provision is directed at the *other* types of land use approvals which follow subdivision approval (*e.g.*, building permit, site plan approval, conditional use permit and variance), not the approval of a vesting tentative map, the extension of such a map or the approval of a final vesting map. *See e.g., Davidson v. County of San Diego*, 49 Cal.App.4th 639, 56 Cal.Rptr.2d 617 (1996) (applying section 66498.1 to a building permit)

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[9] A vesting tentative map gives a developer a vested right to proceed with development, including the right to obtain all necessary building permits and discretionary approvals, in accordance with the local ordinances, policies and standards in effect when the application for the vesting tentative map was complete. Cal. Gov't Code § 66498.1.

Lastly, petitioners note that the City's subdivision ordinance includes a provision for tentative map extensions which requires the city planner or planning commission to find that the extension "is not likely to cause public health or safety problems." That portion of the extension provision, however, is inconsistent with the Map Act, as discussed above. Under California law, local ordinances which are inconsistent with the language and apparent intent of the statute are invalid. *Friends of Lake Arrowhead v. Board of Supervisors*, 38 Cal.App.3d 497, 505, 113 Cal.Rptr. 539 (1974). Thus, several California appellate cases have held that local agencies are not authorized to modify, by ordinance, procedures for tentative map extensions set forth in Government Code section 66452.6. *Griffis*, 163 Cal.App.3d at 426 (county code provision "unlawful and void" to extent it divested advisory agency of authority to grant a tentative map extension or to limits maximum duration to one year); *Friends of Lake Arrowhead*, 38 Cal.App.3d at 508 (county code provision giving "any aggrieved person" the right of administrative appeal is preempted by the Map Act section limiting the right of appeal to subdividers); *El Patio*, 110 Cal.App.3d at 928 (local agency may not reconsider its findings in approving the tentative map or impose new conditions on a grant of tentative map extension). Consequently, the City's ordinance is not helpful to petitioners.

In sum, despite the absence of authority supporting petitioners' argument, and powerful authority pointing to dismissal, the court of appeals stayed its hand to allow the state courts, in the first instance, to determine whether petitioners have a protectible property interest in the time extension of a previously approved tentative

map.[10] The court's decision was proper and does not call for review by this Court.

II.

THE COURT OF APPEAL PROPERLY REFUSED TO CERTIFY THE STATE LAW QUESTION TO THE CALIFORNIA SUPREME COURT

Petitioners also argue that the court of appeals erred in refusing to certify the state law question of whether they have a protectible property interest directly to the

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[10] There are yet other uncertain state law issues which equally justified abstention on *Pullman* grounds. In an effort to mask that other state law issues might eliminate the need to decide federal constitutional questions, petitioners amended the original complaint to delete references to state law questions. The original complaint alleged that each tentative map extension granted was unlawful because the City "(1) failed to provide notice to affected property owners as required by federal and *state law*, and (2) *granted extensions in violation of local ordinances.*" SER 5; CR 1 (italics added). These further determinative issues of state law likewise are uncertain. Ninth Circuit cases consistently have held that whether a city has abused its discretion or has exceeded its jurisdiction in acting on a land use matter – questions which must be addressed under California's comprehensive administrative mandamus scheme – "is by nature a question turning on the peculiar facts of each case in light of the many local and statewide land use laws applicable." *Sederquist v. City of Tiburon*, 590 F.2d 278 (9th Cir. 1978). That court repeatedly has disclaimed any ability to predict whether a state court would decide that the city there abused its discretion. *Pearl Inv. Co. v. City & County of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985). Thus, *Pullman* abstention was justified, independent of whether or not petitioners have protectible property interests at stake.

California Supreme Court under Rule 29.5 of the California Rules of Court.[11]

This Court has held that the decision whether to certify a question of state law to a state supreme court rests in the sound discretion of the federal court. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1941). There are a host of reasons why the court of appeals properly refused to invoke certification in this case.

First, certification is proper under Rule 29.5 only when "the decisions of the California appellate courts provide no controlling precedent concerning the certified question." *El Patio v. Permanent Rent Control Board* is the controlling state court of appeal precedent on the state law question that petitioners sought to have certified.

Second, petitioners provided no compelling reasons why they should be permitted to engineer their way around the state court system, only to have their matter catapulted into the State Supreme Court. Petitioners elected to file in federal court, although they had the right to file this action in state court and to obtain expeditious review of their state and federal claims. *Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 786 n. 5 (9th Cir. 1986). As observed by the Fifth Circuit: "[T]he court should be slow to honor a request for certification

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[11] Rule 29.5, which became effective January 1, 1998, permits the California Supreme Court to answer questions of law certified to it by a federal appeals court, provided that: "(1) the certifying court requests the answer; (2) the questions may be determinative of a cause pending in the certifying court; and (3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question."

from a party who chose to invoke federal jurisdiction." *Jefferson v. Lead Industries Ass'n, Inc.*, 106 F.3d 1245, 1248 (5th Cir. 1997) (citing 17A Wright, Miller, Cooper, *Federal Practice and Procedure* § 4248, at 176 (1988)).

Third, the case is not procedurally or factually poised for review by the state's highest court. The issue sought to be certified is not the only state law involved. As previously discussed (note 10, *supra*), there are other uncertain state law questions which, if properly alleged in a timely state court mandamus action, could obviate the need for the California appellate courts to reach the question of whether petitioners have a protectible property interest in tentative map extensions. See *In re Complaint of McLinn*, 744 F.2d 677 (9th Cir. 1984) (certification not proper where the issue sought to be certified is only one of many involved in the litigation).

Fourth, certification also is not appropriate where it would enable a party, like petitioners here, to evade serious procedural defects in the complaint which would be presented for State Supreme Court review. While these petitioners complain loudly that they had due process rights to notice and an opportunity to be heard concerning the tentative map extensions at issue, they deliberately chose not to name the developer whose valuable subdivision entitlement they seek to invalidate. This simply would not be permissible had the case been filed in state court. *See e.g., Sierra Club, Inc. v. California Coastal Comm'n*, 95 Cal.App.3d 495, 501-02, 157 Cal.Rptr. 190 (1979) (failure to timely name developer whose land use permit is challenged as an indispensable party warrants dismissal of action); *Save Our Bay, Inc. v. San Diego Unified*

Port Dist., 42 Cal.App.4th 686, 49 Cal.Rptr. 847 (1996) (applying same rule to failure to name developer in an action challenging an environmental impact report). Indeed, this may explain why the action was filed in federal court. Petitioners should not profit from this tactic. The court of appeals properly refused to saddle the California Supreme Court with an issue in the absence of the true real party in interest.

Fifth, certification is not appropriate where the matter lacks an adequate factual record. Except as embellished by the parties, the record in this case, with one exception, contains no evidence at all concerning the tentative map extensions at issue or the circumstances surrounding their approval. See ER 6; CR 14. The exception is a letter reflecting an *automatic* extension granted by the California Legislature. Cal. Gov't Code § 66452.13; ER 65; CR 16, Exh. 2.

Finally, the issue sought to be certified is not pending before the State Supreme Court nor is it a question so pressing that certification to the state's highest court is an imperative. *Cf. Bellotti v. Baird*, 428 U.S. 132 (1976) (certifying the issue of the meaning of a state statute governing the type of consent required for an abortion on an unmarried woman under the age of 18), cited by petitioners.

Petitioners disingenuously offer delay and expense as reasons for certification. Frankly, if these were bona fide concerns (as opposed to petitioners' consistent efforts to delay and thereby block this project), petitioners simply could have filed their mandamus action in

state court after receipt of the abstention order in December 1997. The state court process would have long since concluded by now.

The court of appeals properly exercised its discretion in concluding that this is not a proper case for certification.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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City of Rancho Cucamonga,
Brad Buller & Thomas Grahn

Supreme Court, U.S.
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In the

Supreme Court of the United States

CALIFORNIANS UNITED FOR REASONABLE EXPANSION ("CURE"), a Non-profit Unincorporated Association; THOMAS BRADFORD; MARILYN SUE BRADFORD; LEO ORVANANOS; SHIRLEY ORVANANOS,

Petitioners,

versus

CITY OF RANCHO CUCAMONGA; BRAD BULLER, an Individual, in His Individual and Official Capacity; THOMAS GRAHN, an Individual, in his Individual and Official Capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

This is a civil rights case about government corruption for personal gain resulting in irresponsible decisions exposing Petitioners' families to substantial injury and property damage. Challenges to the removal of the Deer Creek Levee by several homeowners' groups, environmental organizations, and Petitioners has caused significant controversy, because these challenges threaten to halt hundreds of millions of dollars of development that cannot proceed if the flood infrastructure is unsafe.[1] A finding that the flood infrastructure is unsafe also will force Respondent, the City of Rancho Cucamonga ("City") to disclose to tens of thousands of people that they are living in a dangerous flood plain and that they must purchase costly flood insurance. The local political opposition to conducting an independent safety study is fierce, and the tactics employed by public officials to prevent that study and unconstitutional. Simply put, the wrongful conduct at issue in this matter affects the safety of literally thousands of people, and it deserves review by this High Court.

When the underlying complaint was stayed by the District Court and subsequently briefed to the Ninth Circuit, Petitioners did not know the magnitude of Respondents' malfeasance. As such, the underlying complaint did not allege the strongest ground for federal jurisdiction – namely a violation of substantive due process. Instead, the complaint was couched in terms of procedural due process violations based upon the City's failure to provide any due process when the City extended the developer's tentative tract map in 1992, 1995 and 1996. It also alleged multiple violations of the California Public Records Act. By the time of the District Court hearing on the motion to dismiss in December 1997, Petitioners naively believed that the City had turned over all relevant documents based upon the

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[1] The Deer Creek Levee ("Levee") blocks development of thousands of acres mostly owned by the flood control district as its height of 20 to 40 feet prevents east/west access across the foothills. Although funded by the federal government, the Levee's destruction is in the hands of local politicians with financial interests in the development.

representations of their counsel. In reality, the City intentionally had concealed the very most critical documents confirming that the Deer Creek Debris Basin and Channel were dangerous and that the City knew it.

Due to the limited nature of Petitioners' procedural due process claim, the District Court stayed the lawsuit and abstained from deciding the merits on the grounds that California law was unclear as to whether Petitioners' had a state recognized protectible property interest triggering the right to procedural due process.

On appeal, Petitioners argued that abstention was inappropriate, because the trial court could predict with some degree of certainty how the California Supreme Court would decide that Petitioners' had a protectible property interest based upon a long line of state court cases upholding the due process rights of adjacent property owners.[2] The abstention doctrine articulated in *Railroad Commission v. Pullman Co.*,[3] is a narrow exception to the district court's duty to decide cases properly before it and is proper "only in exceptional cases where principals of comity and federalism justify postponing the exercise of jurisdiction that Congress conferred upon federal courts." *Pearl Investment Co. v. City of San Francisco*, 774 F.2d 1460 (9th Cir. 1985). In *Pearl*, the Court stressed that a district court should exercise jurisdiction unless it "cannot predict with any confidence how the state's highest court would decide an issue of state law." *Id.* at 1462. As the California Supreme Court historically has been a leader in upholding the rights of citizens to due process in government proceedings, Petitioners argued that clear precedent existed for recognizing a protectible property interest particularly given the severity of the safety issues involved.[4] From a policy perspective, Petitioners further

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[2] See Lodging Section V.

[3] 312 U.S. 496 (1941).

[4] Importantly, none of the Ninth Circuit's decisions upholding *Pullman* abstention are remotely on point. The most applicable decision, *Lapham v. California Energy Resources Conservation & Dev. Com.*, 705 F.2d 358 (9th Cir. 1983), merely involved whether Petitioners had a right to due process before an electrical transmission line was installed near their homes.

argued that the District Court should be even less inclined to abstain in civil rights cases where the Petitioners would end up before a court biased by local politics. See Field, Abstention in Constitutional Cases: The Scope of the *Pullman* Abstention Doctrine, 122 U. Pa. L. Rev. 1071 (1974) (The state procedure should be deemed inadequate when individual litigants suffer substantial prejudice in addition to that accompanying the delay.).[5] Finally, Petitioners asserted that, even if abstention were appropriate, the Ninth Circuit should certify the matter to the California Supreme Court as doing so provided the most expeditious remedy for vindication of Petitioners' civil rights. Where certification is available, this Court consistently has held that it is preferable over abstention. *Lehman Brothers v. Schein*, 416 U.S. 386 (1974); *Bellotti v. Baird*, 428 U.S. 132 (1976).[6]

The Ninth Circuit held that there was sufficient uncertainty about the applicable state statute that the trial court had not abused its discretion. Unlike the instant case, however, absolutely none of the Ninth Circuit decisions contained allegations of unlawful or corrupt conduct on the part of the very decision-makers involved.

[5] One case, Attorney Kaufman falsely asserted that the Deer Creek Channel was designed to convey ("pass") flood flows of 15,000 cubic feet per second. Mr. Kaufman made this false assertion though three separate documents in the City's possession listed 5,400 cubic feet per second as the maximum capacity of the Deer Creek Channel, prior to convergence with other streams. Petitioners attempted to submit these design documents verifying the channel capacity as only 5,400. Were the court impartial, it would have corrected the record and likely reprimanded the City. Instead, the judge in his decision issued as a specific finding that the Deer Creek Channel has a 15,000 cubic foot per second capacity.

[6] Arguments before the Ninth Circuit in January 2000 included a lengthy discussion of *extra record* evidence about the status quo surrounding removal of the FEMA-rated Deer Creek Levee. Specifically discussed was the fact that Senator Feinstein and Senator Boxer had just demanded that the Secretary of Army conduct the very safety study Petitioners had been requesting. At that time, it was assumed that the Pentagon would conduct the safety study in response to the Senators. Saving the Levee, however, is but one of the forms of relief sought in the underlying civil rights case. Petitioners also seek to vindicate the significant deprivation of rights that has occurred by virtue of their inability to obtain an independent safety study due to local corruption; the monetary effect on Petitioners having to spend

The Ninth Circuit did not address the substantive due process argument applicable to this matter, as it had not been advanced at the trial court or in the Ninth Circuit briefs. The extent of the City's wrongdoing simply was unknown in 1997, when the District Court stayed the action. Had Petitioners known of these facts, they could have amended their complaint to add a claim for deprivation of substantive due process rights.

For the above reasons, Petitioners request that this Court reverse the District Court's decision on abstention or, alternatively, that the Ninth Circuit be directed to certify the case to the California Supreme Court. Petitioners further request that the case be remanded to permit the amendment of the complaint to add a claim for violation of substantive due process. This Court has long recognized that citizens possess certain fundamental rights that no government should infringe. The right to be safe in one's home unquestionably is such a fundamental right.[7]

I. SUFFICIENT FACTS ARE NOW KNOWN TO STATE A CLAIM FOR DEPRIVATION OF SUBSTANTIVE DUE PROCESS.

Petitioners request that this Court permit amendment of the complaint to include a claim for substantive due process. Given Petitioners' request, a further factual background is necessary to place this matter in its proper context. Although many of these facts were alleged in the underlying complaint; significant new evidence has been discovered in the past three years supporting claims against additional individual defendants including the City Engineer, the City Attorney, and employees of the County Flood District. The following facts would be alleged in an amended complaint.

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hundreds of thousands of dollars to secure those rights; and the fact that there remains no guarantee that the levee will not be demolished regardless of the Senators' help, thus jeopardizing Petitioners' right to be safe in their homes.

[7] *Rochin v. California*, 342 U. S. 165 (1957). See also, *Brennan v. Stewart*, 834 F.2d 1248, 1255-57 (5th Cir. 1988); Monaghan, Of "Liberty" and "Property", 62 CORNELL L.Rev. 405, 420 (1977). Substantive due process is the "heavy artillery of constitutional litigation . . . " *Steuart v. Suskie*, 857 F.2d 1148, 1150 (8th Cir. 1989).

In 1990, the City approved 40-home development based upon a negative declaration The negative declaration – the document under State law alerting the public to environmental and safety concerns -- was completely silent about the Deer Creek Levee's removal. Indeed, there was not a single public document alerting the community to this fact.

None of the Petitioners lived in the area in 1990. Petitioners first learned of the impending removal of the Levee in late May 1997, long after they had constructed their homes. Counsel for CURE immediately served a Public Records Act Request with defendant Grahn. At that time, the Planning Commissioner, David Barker, instructed respondents Buller and Grahn not to produce certain documents to Petitioners, because doing so would prevent Petitioners from properly preparing for the June 11, 1997 public hearing. Defendant Grahn also falsely told the community that the Levee was not being removed, and further informed people that the matter was on the Consent Agenda so that no public input would be permitted.

The response to Petitioners' Public Records Act request was paltry, and several material documents obviously were omitted including documents concerning the City's Memorandum of Agreement with the United States Fish & Wildlife Service restricting development in areas of sensitive habitat. Moreover, there were absolutely no documents produced concerning the safety issues surrounding removal of the Levee. On June 11, 1997, the Planning Commission continued the matter to July 9, 1997. Thereafter, counsel for Petitioners made several efforts to contact City Attorney James Markman by letter and telephone to seek his assistance in obtaining documents. No response was forthcoming.

In filing the original complaint, Petitioners were attempting to force the City to produce the relevant documents before the July 9, 1999 hearing and to ensure the City understood that the residents would do whatever was necessary never to counter the City's unsafe actions. The documents were not received and the Planning Commission, chaired by Mr. Barker, granted the developer's permits. An appeal to the City Council ensued. Prior to the City Council's hearing on August 20, 1997,

a number of documents were produced, and Petitioners believed that the City had complied. It was only discovered literally 15 months later that the City had withheld and concealed numerous specific documents about the flood infrastructure proving that the City had knowledge that the situation was unsafe. None of those documents were available in August 1997.

In August 1997, a City Council member receptive to conducting further environmental review, questioned the City Engineer, whether removal of the Levee was safe. In response, the City Engineer falsely represented that he had "no idea" about the capacity of the Levee, that no one knew "who built it" and that it was a "mound of dirt". Unknown to Petitioners at that time, the City Engineer had documents within his very files reflecting that the Army Corps of Engineers had made improvements to the Levee in the early 1970s and 1980s, and that FEMA had credited the Levee to handle a 100-year flood event in 1984, one year before the San Bernardino County Flood Control District sold it to a private developer and six years prior to the City approving its removal.[8]

Based upon this evidence, the City Council held that no further environmental review was necessary. The City points out, correctly, that Petitioners were able to challenge that decision on an Administrative Writ of Mandate, and that the trial court upheld the City's decision. These mandate proceedings are based upon a limited administrative records and, under California law, the trial court must defer to the City Council if there is any

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[8] Attorney Kaufman falsely characterizes the Levee as an "unlined, training levee" that was breached before the City approved its grading in 1990. (Respondents Brief at n 2). This is simply false. The Levee was breached in 1992 in a rip-rapped re-directional (i.e., training) levee, designed to turn and convey high velocity flood & debris flows. Even the developer estimated the Levee can handle more than 257-acre feet or 500,000 tons of debris and 72,000 cubic feet per second. The Levee is substantially larger than the alternative trapazoidal "channel" referenced by the City at page 3 of their brief. That channel – as counsel well knows – is designed to handle 474 cubic feet per second only or .6 percent of the Levee's capacity. Even if it would hold one percent of what the Levee holds, Petitioners take no solace in such a "replacement".

evidence to support its holding that no additional environmental review is required. The remedies in these mandate cases, moreover, are vastly different than what Petitioners pray for in a federal civil rights action. Under mandate, the trial court does not address any of the bad faith conduct of the City or the individual defendants (none of whom can even be named in mandate cases), including the concealment of documents demonstrating the City's knowledge that removal of the levee was dangerous, and intentionally false statements by the City (and its attorneys) about the capacity of the flood channel. No discovery is permitted at either the City Council or trial court stages so that it is impossible to cross-examine or rebut witnesses or delve into the financial bias of the decision-makers. No jury trial is available and no monetary damages can be awarded.

II. DEFENDANTS CONDUCT IS FUNDAMENTALLY UNFAIR AND BASED UPON AN IMPROPER MOTIVE IN VIOLATION OF PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS.

Without question, Petitioners enjoy a substantive due process right to be free from government action that would render them unsafe in their own homes. Substantive due process affords "a general prohibition against arbitrary and unreasonable governmental action." *Thompson v. Gallagher*, 489 F.2d 443, 446 (5th Cir. 1973). See also, *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1968) (substantive due process "stems from our American ideals of fundamental fairness . . . [which] enmeshes the judiciary in substantive review of governmental action.") It is the "heavy artillery" of constitutional litigation . . ." *Steuart v. Suskie*, 867 F. 2d 1148, 1150 (8th Cir. 1989).

Although this Court has witnessed a resurgence of substantive due process claims where government officials have engaged in wrongful conduct impacting a plaintiff's fundamental rights, its roots date back to the earliest days of our union. "The people of the United States erected their Constitutions . . . to establish justice, to promote the general welfare, to secure the blessings of liberty; and *to protect their persons and property from violence.*" *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 3867

(1798). "Substantive due process grew out of the natural law theories of the Seventeenth and Eighteen centuries. All men were thought to be possessed with certain fundamental rights that no government should infringe." D. Hagman and J. Juergensmeyer, Urban Planning and Land Development Control, § 10.2 at 296 (2d ed 1986).

Substantive due process rights are not dependent upon property rights under state law. Rather, substantive due process affords plaintiffs a broad residual theory to challenge the root of governmental conduct and typically affords remedies consistent of compensatory and punitive damages along with equitable relief where appropriate. *See* V. FONTANA, MUNICIPAL LIABILITY: LAW AND PRACTICE § 4.8 (1990).

Government conduct premised upon bad faith or other improper pecuniary motives undisputedly supports a claim for violation of Petitioners' due process rights. The notion that government employees empowered to protect the health and safety of their community, would conceal and destroy documents demonstrating unsafe conditions satisfies the "shocks the conscience" test employed to ascertain the appropriateness of such a claim regardless of whether it involves local land use decisions. No special deference is provided government employees simply because the matter involves land use. *Altaire Builders, Inc. v. Village of Horseheads*, 551 F. Supp. 1066, 1069 (W.D.N.Y. 1982) ("Regardless of the deference normally accorded zoning practices by the courts, the Constitution does not tolerate arbitrary and unreasoned action.") The Ninth Circuit also has applied substantive due process in the land use context. In *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), the Ninth Circuit observed that "arbitrary administration of the local regulations, which singles out one individual to be treated discriminatorily, amounts to a violation of that individuals substantive due process. *See Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988) (reversing summary judgment for city; building permit denial as a result of political animus violates substantive due process.) See also, *Bellow v. Walker*, 840 F.2d 1124 (3rd Cir. 1988) ("substantive due process available where municipality had improperly interfered with the permit process,

and did so for partisan political or personal reasons unrelated to the merits of the application.")

Here, defendants' conduct in concealing information and then ruling against performing a safety study allegedly is motivated by factors unrelated to the merits of the permit process. Certainly, individual property owners impacted by those decisions have no less right to a substantive due process claim then the permittee. Having alleged that the government officials in this case have acted wrongful, Petitioners have demonstrated a substantive due process violation

III. THIS COURT MAY PERMIT AN AMENDING OF THE COMPLAINT ON APPEAL

Federal Rule of Civil Procedure, Rule 15(a), declares that leave to amend a complaint "shall be freely given when justice so requires." As this Court has stated on numerous occasions, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given'." *Forman v. Davis*, 371 U.S. 178, 82 (1962). No factor limiting the right to amend are present here.

In the context of a civil rights action, the Seventh Circuit held that the "amendment [of a complaint] can be allowed with leave of the Court of Appeals. [Citations omitted]. This may be accomplished either by the appellate court itself granting leave to amend or by remanding to the District Court to consider the motion." *Cohen v. Illinois Institute of Technology*, 581 F.2d 658, 62 (7th Cir. 1978). The Eighth Circuit Court of Appeal also has held that "[a]n amendment can be proper after remand to the District Court even if the claim was presented for the first time on appeal or had not been presented to the District Court in a timely fashion." *Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir. 1983) (reversing summary judgment and directing trial court to permit amendment of pleading even though theory

not raised below). In *Howard*, the appellant made his first specific reference to a tort theory of recovery on appeal, independent of his original contract claim. The Appellate Court ordered "[i]f the District Court did not rule on Howard's tort claim, that court should consider the claim in the first instance. If the court feels the issue had not been presented below, the court can permit Howard to amend its counterclaim pursuant to Fed. R. Civ. P. 15(a) to include the tort claim." *Id.*

Recognizing the liberality with which amendment is granted under Fed.R.Civ. Proc. Rule 15(a), Petitioners urge this Court to permit amendment now.

IV. CONCLUSION

The United States Supreme Court has the power to assume jurisdiction and to address Petitioners' constitutional rights. This is not a local land use case but a case about the wrongful conduct of government officials. The existing and proposed amended complaint is an indictment of those local officials and politicians who would recklessly endanger the public safety simply to line their own pockets. Petitioners have fought this battle at great personal expense to protect their families from unsafe conditions created by the very government entrusted to protect them. Those rights are protected by the federal constitution and should be vindicated in a federal court free from local bias.

For the reasons stated above, Petitioners request that the Petition for Writ of Certiori be granted.

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